



FEDERAL MARITIME COMMISSION

46 CFR Part 502

Docket No. 13-06

RIN: 3072-AC52

Commission's Rules of Practice and Procedure; Practice Before the Commission, Parties to Proceedings, and Rulemakings

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission (FMC or Commission) amends its Rules of Practice and Procedure regarding practice before the Commission, parties to proceedings, and rulemakings, to update, clarify, and reduce the burden on parties to proceedings before the Commission.

DATES: Effective: July 29, 2013.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

The Commission's Rules of Practice and Procedure, 46 CFR Part 502, govern procedures before the Commission. 46 CFR 502.1-502.991. The rules are in place to secure just, speedy, and inexpensive resolution of proceedings before the Commission. The Commission is engaged

in an ongoing process of reviewing its rules of practice and revising those that are outdated, unclear, or unduly burdensome. This effort resulted in revision to Subpart A to modernize and clarify general filing requirements effective February 24, 2011, and amendments to Subparts E and L, effective November 12, 2012. See 76 FR 10258, Feb. 24, 2011 and 77 FR 61519, Oct. 10, 2012. As part of this continuing process, the Commission has determined to amend Subparts B, C, D, and certain additional sections in E. The amendments include transferring certain rules from one subpart to another without change in substance to better reflect the subject matter addressed by existing subparts. The amendments also include revisions for purposes of clarification, modernization, or to reflect current practice, technical, non-substantive changes to effect renumbering and removal of rules, as well as correction of some typographical errors in the rules.

A description of the more significant changes follows:

Section 502.25 – Presiding Officer.

The Final Rule restates the presiding officer’s authority presently contained in Subpart J §502.147 and includes in separate paragraphs the provisions presently found in §§ 502.145, 146, and 149. The Commission has determined that provisions related to the presiding officer’s authority and functions are more appropriately described in proximity to the definition of the presiding officer in “Subpart B – Appearance and Practice Before the Commission.” Subheadings are added describing the presiding officer’s authority for ease of reference without change in substance of the enumerated powers. Current § 502.148 governing the consolidation of proceedings is moved and restated in a new § 502.79 in Subpart E governing proceedings.

Section 502.27 – Persons not attorneys at law.

Section 502.27 is amended to streamline the Commission's rules regarding practice before the Commission by persons who are not admitted to the practice of law by a State bar. The rule is updated to provide that the application for admission may be obtained on-line or from the Secretary. The provisions previously found in Sections 502.29 and 502.30 governing a non-attorney's qualifications for admission to practice, to continue representing others after admission, and the right to a hearing in the event of denial of admission, suspension, or disbarment are folded into this section for clarity.

Exhibit No. 1 to Subpart B [§§ 502.23, 502.26, 502.27] of Part 502 – Notice of Appearance.

Exhibit No. 1 to Subpart B, a sample format for a Notice of Appearance, is amended to request an indication of authority for representation, and to allow for selection of technologically current methods of service of notices and orders in proceedings. The revised form is consistent with current Commission practice.

Section 502.41 – Parties; how designated.

Section 502.41 of Subpart C is revised to add to the term “party” a unit of a government agency representing such agency. It also reflects the current citations of other rules that were renumbered by prior amendments.

Section 502.42 – Bureau of Enforcement.

Section 502.42 is amended to simplify the language describing when the Bureau of Enforcement may become a party to proceedings.

Section 502.43 – Substitution of Parties.

Section 502.43 is modified to harmonize the language of the Federal Rules of Civil Procedure.

Section 502.44 – Necessary and proper parties in certain complaint proceedings.

Section 502.44 is eliminated as unnecessary.

Subpart D- Rulemaking.

Language in §§ 502.52, 502.53, 502.54, and 502.55 is revised for clarity. The requirement that service on prior participants be made when submitting comments or replies beyond the initial round in proposed rulemaking proceedings, also found in §502.114, is reiterated in § 502.57

Subpart E, section 502.79 – Consolidation of proceedings.

New § 502.79 restates the language of current § 502.148 authorizing the consolidation of proceedings involving substantially the same issues. The Commission has determined that this provision is more appropriately stated in Subpart E, governing proceedings.

Section 502.201(h) – Duty to disclose; general provisions governing discovery.

Section 502.201(h) is amended to make the timing of the parties' conference consistent with the requirements of § 502.64. It also corrects a typographical error with respect to the discovery period which was changed to 150 days effective November 12, 2012.

These amendments affect only the Commission's Rules of Practice and Procedure and, as such, are not subject to the general notice of proposed rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553(b)(A). The Commission has determined to publish the amendments as a final rule. Therefore, this final rule is not subject to the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

This Final Rule is not a "major rule" under 5 U.S.C. 804(2).

List of Subjects in 46 CFR Part 502

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements.

For the reasons stated in the supplementary information, the Federal Maritime

Commission amends 46 CFR Part 502 as follows.

PART 502—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for Part 502 is revised to read as follows:

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561-569, 571-596; 5 U.S.C. 571-584; 18 U.S.C. 207; 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. 305, 40103-40104, 40304, 40306, 40501-40503, 40701-40706, 41101-41109, 41301-41309, 44101-44106; E.O. 11222 of May 8, 1965.

2. Amend §502.21 by revising the heading of paragraph (b), and by revising paragraph (c) to read as follows:

§ 502.21 Appearance

(b) *Non-parties.* * * *

(c) *Special appearance.* An appearance may be either general, that is, without reservation, or it may be special, that is, confined to a particular issue or question. A person who desires to appear specially must expressly so state when entering the appearance, and, at that time, shall also state the questions or issues to which the appearance is confined; otherwise the appearance will be considered general. [Rule 21.]

3. Amend §502.23 by revising paragraphs (a), (c), and (d), and adding paragraph (e), to read as follows:

§ 502.23 Notice of appearance; substitution and withdrawal of representative.

(a) Upon filing of a complaint instituting proceedings or filing of an answer to an order or complaint, the party filing shall notify the Commission of the name(s), address(es), telephone number(s), and email address(es) of the person or persons who will represent the party in the pending proceeding. Each person who appears in a representative capacity in a proceeding must deliver a written notice of appearance to the Secretary stating for whom the appearance is made. Such notice must indicate whether the representative wishes to be notified of notices, orders and decisions by either e-mail or facsimile transmission. All appearances shall be noted in the record. Motions for leave to intervene must indicate the name(s), address(es), telephone number(s), and email address(es) of the person or persons who will represent the intervenor in the pending proceeding if the motion is granted.

(c) An attorney must represent in the Notice of Appearance that he is admitted to practice and in good standing. A non-attorney must describe his or her authority to act in such capacity.

(d) If an attorney or other representative of record is superseded, there shall be filed a stipulation of substitution signed both by the attorney(s) or representative(s) and by the party, or a written notice from the party to the Commission with a Notice of Appearance included. Substitution of counsel or representative will not, by itself, be considered good cause for delaying a proceeding.

(e) If an attorney wishes to withdraw from representing a party, and written consent is not obtained, or if the party is not otherwise represented, the withdrawing attorney shall file an appropriate motion seeking permission to withdraw and provide appropriate reasons for making the motion. Such motion will be decided in consideration of the factors and standards set forth in

Rule 1.16 of the American Bar Association's Model Rules of Professional Conduct and by the courts. [Rule 23.]

4. Revise §502.25 to read as follows:

§ 502.25 Presiding officer.

(a) *Definition.* Presiding officer includes, where applicable, one or more members of the Commission or an administrative law judge.

(b) *Functions and powers.* The officer designated to hear a case shall have the following powers:

(1) *Notices of hearing, subpoenas, depositions, pleadings and scope of proceedings.* To arrange and give notice of hearing; sign and issue subpoenas authorized by law; take or cause depositions to be taken; rule upon proposed amendments or supplements to pleadings; and, delineate the scope of a proceeding instituted by order of the Commission by amending, modifying, clarifying, or interpreting said order.

(2) *Alternative means of dispute resolution and conferences for settlement or simplification of issues.* To inform the parties as to the availability of one or more alternative means of dispute resolution, encourage use of such methods, and require consideration of their use at an early state of the proceeding; hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution; transmit the request of parties for the appointment of a mediator or settlement judge, as provided by § 502.91; and require the attendance at any such conference pursuant to 5 U.S.C 556(c)(8), of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy.

(3) *Hearings, evidence, procedural requests, motions, oaths and affirmations, and witnesses.* To regulate the course of a hearing; prescribe the order in which evidence shall be presented; dispose of procedural requests or similar matters; hear and rule upon motions; administer oaths and affirmations; examine witnesses; direct witnesses to testify or produce evidence available to them; rule upon offers of proof and receive relevant, material, reliable, and probative evidence; act upon motions to intervene; permit submission of facts, arguments, offers of settlement, and proposals of adjustment; and, if the parties so request, issue formal opinions providing tentative evaluations of the evidence submitted; hear oral argument at the close of the testimony.

(4) *Time management and other matters.* To fix the time for filing briefs, motions, and other documents to be filed in connection with hearings and the administrative law judge's decision thereon, except as otherwise provided by the rules in this part; act upon petitions for enlargement of time to file such documents, including answers to formal complaints; and dispose of any other matter that normally and properly arises in the course of proceedings.

(5) *Exclusion of persons from a hearing.* To exclude any person from a hearing for disrespectful, disorderly, or inappropriate language or conduct.

(c) *Functions and powers pursuant to Reorganization Plan No. 7 of 1961.* All of the functions delegated in subparts A to Q and subpart T of this part, inclusive, to the Chief Judge, presiding officer, or administrative law judge include the functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter, pursuant to the provisions of section 105 of Reorganization Plan No. 7 of 1961. [Rule 147.]

(d) *Designation of administrative law judge.* An administrative law judge will be designated by the Chief Administrative Law Judge to preside at hearings required by statute, in rotation so far

as practicable, unless the Commission or one or more members thereof shall preside, and will also preside at hearings not required by statute when designated to do so by the Commission.

(e) *Attachment of functions.* In proceedings handled by the Office of Administrative Law Judges, its functions shall attach:

(1) Upon the service by the Commission of a Notice of Filing of Complaint and Assignment of complaint filed pursuant to § 502.62, or § 502.182, or upon referral under subpart T of this part;

or

(2) Upon reference by the Commission of a petition for a declaratory order pursuant to §502.68;

or

(3) Upon forwarding for assignment by the Office of the Secretary of a special docket application pursuant to § 502.271; or

(4) Upon the initiation of a proceeding and ordering of hearing before an administrative law judge pursuant to § 502.63.

(f) *Unavailability.* If the presiding officer assigned to a proceeding becomes unavailable, the Commission, or Chief Judge (if such presiding officer was an administrative law judge), shall designate a qualified officer to take his or her place. Any motion predicated upon the substitution of a new presiding officer for one originally designated shall be made within ten (10) days after notice of such substitution.

(g) *Disqualification of presiding or participating officer.* Any presiding or participating officer may at any time withdraw if he or she deems himself or herself disqualified, in which case there will be designated another presiding officer. If a party to a proceeding, or its representative, files a timely and sufficient affidavit of personal bias or disqualification of a presiding or participating

officer, the Commission will determine the matter as a part of the record and decision in the case.
[Rule 25.]

5. Amend § 502.26 by removing “An attorney must represent in writing, filed with the Secretary, that he is admitted to practice and in good standing.”
6. Amend § 502.27 by revising paragraphs (a)(2), (b) and (c), and adding paragraphs (a)(3), (d) and (e) to read as follows:

§ 502.27 Persons not attorneys at law.

(a) * * *

(2) The application for admission to practice before the Commission by persons not attorneys at law can be downloaded from the Commission’s website, www.fmc.gov, or acquired from the Secretary of the Commission and must be accompanied by a fee as required by § 503.43(e) of this chapter. The application should be sent to the Federal Maritime Commission, Washington, DC 20573.

(3) All applicants must complete the following certification:

I. ____ (Name) ____, certify under penalty of perjury under the laws of the United States, that I have not been convicted, after September 1, 1989, of any Federal or State offense involving the distribution or possession of a controlled substance, or that if I have been so convicted, I am not ineligible to receive Federal benefits, either by court order or operation of law, pursuant to 21 U.S.C. 862.

(b) The Commission, in its discretion, may call upon the applicant for a full statement of the nature and extent of his or her qualifications. If the Commission is not satisfied as to the sufficiency of the applicant's qualifications, it will so notify him or her by registered mail, whereupon he or she shall be granted a hearing upon request for the purpose of showing his or her qualifications. If the applicant presents to the Commission no request for such hearing within twenty (20) days after receiving the notification above referred to, his or her application shall be acted upon without further notice.

(c) The Commission may deny admission to, suspend, or prohibit any person from practice before the Commission who it finds does not possess the requisite qualifications to represent others or is lacking in character, integrity, or proper professional conduct. Non-attorneys who have been admitted to practice before the Commission may be excluded from such practice only after being afforded an opportunity to be heard.

(d) A non-attorney may not practice before the Commission unless and until an application has been approved.

(e) Paragraph (d) of this section shall not apply, however, to any person who appears before the Commission on his or her own behalf or on behalf of any corporation, partnership, or association of which he or she is a partner, officer, or regular employee. [Rule 27.]

§ 502.29 [Removed and Reserved]

7. Remove and reserve §502.29.

§ 502.30 [Removed and Reserved]

8. Remove and reserve §502.30.

9. Revise Exhibit No. 1 to Subpart B of Part 502 to read as follows:

Exhibit No. 1 to Subpart B [§§ 502.23, 502.26, 502.27] of Part 502—Notice of Appearance

Federal Maritime Commission

Docket No. _____:

Please enter my appearance in this proceeding as counsel for _____.

Indicate authority for representation [choose one of the following]:

___ I am an attorney admitted to practice and in good standing before the courts of the State of _____.

___ I am admitted to practice before the Commission pursuant to 46 C.F.R. 502.27.

___ I am an officer, director, or regular employee of the party.

I request to be informed of service of notices, orders and decisions in this proceeding by [choose one of the following]:

[] electronic mail

[] facsimile transmission

[] regular mail

[Name]

[Address]

[Telephone No.]

[Fax No.]

[E-mail address]

[Signature]

10. Revise §502.41 to read as follows:

§ 502.41 Parties; how designated.

The term “party,” whenever used in this part, includes any natural person, corporation, association, firm, partnership, trustee, receiver, agency, public or private organization, government agency, or unit thereof representing said agency. A party who files a complaint under § 502.62 shall be designated as “complainant.” A party against whom relief or other affirmative action is sought in a proceeding commenced under § 502.62 or § 502.73 or a party named in an order of investigation issued by the Commission shall be designated as “respondent,” except that in investigations instituted under section 11(c) of the Shipping Act of 1984, 46 U.S.C. 41302(a)-(b), 41307(b), the parties to the agreement shall be designated as “proponents” and the parties protesting the agreement shall be designated as “protestants.” A person who has been permitted to intervene under § 502.68 shall be designated as “intervenor.” All parties and persons designated in this section shall be parties to the proceeding. No person other than a party or its representative may introduce evidence or examine witnesses at hearings. [Rule 41].

11. Revise §502.42 to read as follows:

§ 502.42 Bureau of Enforcement.

The Bureau of Enforcement shall be a party to proceedings upon designation by the Commission or upon leave to intervene granted pursuant to § 502.68. The Bureau’s representative shall be served with copies of all papers, pleadings, and documents in every proceeding in which the Bureau is a party. The Bureau shall actively participate in any proceeding to which it is a party,

to the extent required in the public interest, subject to the separation of functions required by section 5(c) of the Administrative Procedure Act. [Rule 42]

12. Revise § 502.43 to read as follows:

§ 502.43 Substitution of parties.

The Commission or presiding officer may order an appropriate substitution of parties in the event of a party's death, incompetence, transfer of its interest, or other appropriate circumstance. [Rule 43]

§ 502.29 [Removed and Reserved]

13. Remove § 502.44.

14. Revise § 502.52(b) to read as follows:

§ 502.52 Notice of proposed rulemaking.

(b) Except where notice or hearing is required by statute, paragraph (a) of this section shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice of the Commission, or when the Commission for good cause finds (and incorporates the findings and a brief statement of reasons therefor in the rules issued) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. [Rule 52]

15. Amend § 502.53 as follows:

- a. Amend paragraph (a) by removing “to present the same orally in any manner” and adding “for oral presentation” in its place;
- b. Amend paragraph (b) by adding “rulemaking” in between “In those” and “proceedings”; and
- c. Add a new paragraph (c) to read as follows.

§ 502.53 Participation in rulemaking.

* * * * *

(c) Where a formal hearing is held in a rulemaking proceeding, interested persons will be afforded an opportunity to participate through submission of relevant, material, reliable, and probative written evidence properly verified, except that such evidence submitted by persons not present at the hearing will not be made a part of the record if objected to by any party on the ground that the person who submits the evidence is not present for cross-examination.

16. Revise § 502.54 to read as follows:

§ 502.54 Contents of rules.

The Commission will incorporate in any publication of proposed or final rules a concise and general statement of their basis and purpose. [Rule 54.]

16. Revise § 502.55 to read as follows:

§ 502.55 Effective date of rules.

The publication or service of any substantive rule shall be made not less than thirty (30) days prior to its effective date except:

- (a) As otherwise provided by the Commission for good cause found that notice and public procedure thereon are impractical, unnecessary, or contrary to the public interest;
- (b) In the case of rules granting or recognizing exemption or relieving restriction; interpretative rules; or statements of policy.
- (c) Interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice. [Rule 55.]

17. Add new § 502.57 to subpart D to read as follows:

§ 502.57 Service by parties of pleadings and other documents.

Service on all prior commenters must be shown when submitting comments or replies beyond the initial round on a notice of proposed rulemaking. A list of all participants may be obtained from the Secretary of the Commission.

18. Add new §502.79 to subpart E to read as follows:

§ 502.79 Consolidation of proceedings.

The Commission or the Chief Administrative Law Judge (or designee) may order two or more proceedings which involve substantially the same issues consolidated and heard together.

§§ 502.145 – 502.149 [Removed and Reserved]

19. Remove and reserve § 502.145 – § 502.149.

20. Amend § 502.201(h) by removing “14 days,” and adding “15 days” in its place, and removing “120-day,” and adding “150-day” in its place.

By the Commission.

Karen V. Gregory
Secretary

[FR Doc. 2013-17953 Filed 07/25/2013
at 8:45 am; Publication Date:
07/26/2013]